

United States Department of Justice
Executive Office for Immigration Review
Immigration Court
[Street Address]
[City, State] [Zip Code]

)
File No.: [Alien Registration Number]) Date: [Month Day, Year]
)
In the Matter of) IN [Proceeding Type]
)
[Respondent's Name],) PROCEEDINGS
)
Respondent)
)

ON BEHALF OF RESPONDENT:

Pro Se
[Location of detention]

ON BEHALF OF DHS:

[Government Attorney]
Department of Homeland Security
Immigration and Customs Enforcement
[Street Address]
[City, State] [Zip Code]

DECISION AND ORDER OF THE IMMIGRATION JUDGE

*(for use in cases subject to the orders of the court in Franco-Gonzales v. Holder
where competence of respondent to represent him- or herself is in issue)*

Jurisdiction

A Notice to Appear for the above-named respondent was filed in this case on [Date]. The filing of this charging document commenced proceedings and vested jurisdiction with this court.

Issue

There is an issue as to whether the respondent is competent to represent [himself/herself] in this proceeding.

Burden of Proof

There is no presumption that a Class Member is competent or incompetent to represent *[himself/herself]* in an immigration proceeding and neither party is assigned the burden of production or persuasion on the issue of competence.

Rather, the issue of whether a Class Member is competent to represent *[himself/herself]* in an immigration proceeding is based upon whether there is no reasonable cause to believe the respondent is suffering from a mental disorder that impairs his or her ability to perform the functions listed in the definition of competence to represent him- or herself. A respondent is incompetent if a preponderance of the evidence establishes that the individual is not competent to represent him- or herself in the proceedings. If the evidence is not sufficient to support a finding of incompetence, but the Immigration Judge has reasonable cause to believe that the respondent is suffering from a mental disorder that may impair his or her ability to represent him- or herself, the Immigration Judge must then refer the case for a Forensic Competency Evaluation by a Mental Health Professional.

Statement of Law & Procedure

A. Definition of Competence to Represent Oneself

When determining whether an unrepresented respondent is competent to represent him- or herself in an immigration proceeding, the Immigration Judge must consider *both* the individual's ability to meaningfully participate in the proceeding as set forth in *Matter of M-A-M-*, 25 I&N Dec. 474 (BIA 2011) and the individual's ability to perform additional functions necessary for self-representation.

Immigration Judges shall consider the following when determining if a respondent is competent to represent him- or herself:

First, the respondent must be able to meaningfully participate in the proceeding as set forth in *Matter of M-A-M-*. To meaningfully participate, the respondent must have a rational and factual understanding of:

- a. the nature and object of the proceeding;
- b. the privilege of representation by counsel;
- c. the right to present, examine, and object to evidence;
- d. the right to cross-examine witnesses; and
- e. the right to appeal.

Second, for an unrepresented respondent to be competent to represent him- or herself in an immigration proceeding, he or she must also be able to perform additional functions necessary for self-representation. To represent him- or herself, the respondent must have sufficient present ability to:

- a. exercise the rights listed above;
- b. make informed decisions about whether to waive the rights listed above;
- c. respond to the allegations and charges in the proceeding;
- d. present information and evidence relevant to eligibility for relief; and
- e. act upon instructions and information presented by the Immigration Judge and government counsel.

A respondent is incompetent to represent him- or herself in an immigration proceeding if he or she, because of a mental disorder (including Intellectual Disability), is unable to satisfy any of the provisions above. “Mental disorder” (including Intellectual Disability) is defined as a significant impairment of the cognitive, emotional, or behavioral functioning of a person.

[The following italicized guidance is provided to assist in applying the definition of *pro se* competency:

First, in applying the above definition, the presence of a legal guardian, near relative, friend, or custodian, under 8 C.F.R. § 1240.4 shall not affect an Immigration Judge’s assessment of whether a respondent is able to perform the additional functions necessary for self-representation.

Second, in assessing whether the respondent can respond to allegations and charges in the proceedings, the Immigration Judge should consider, among other things, the person’s ability to evaluate and coherently discuss legal arguments and defenses.

Third, in assessing whether the respondent can present information and evidence relevant to eligibility for relief, the Immigration Judge should consider, among other things, the person’s ability to present rational and coherent testimony based upon adequate recall.]

B. Procedure for Determining Competence for Class Members

Where the respondent is a member of the class in *Franco-Gonzales v. Holder*, and the Department of Homeland Security has filed a notice of Class Membership with the Immigration Court or the Board of Immigration Appeals, the Immigration Judge must conduct a Judicial Competency Inquiry.

At the conclusion of the Judicial Competency Inquiry, the Immigration Judge will weigh the evidence of record and determine that: 1) there is no reasonable cause to believe the respondent is suffering from a mental disorder that impairs his or her ability to perform a function required by the definition of competence to represent oneself, and accordingly, the respondent is competent, or 2) a preponderance of the evidence establishes that the respondent is incompetent (i.e, the respondent has a mental disorder that significantly impairs [his/her] cognitive, emotional, or behavioral ability to perform a function required for self-representation). Alternatively, the Immigration Judge may find the evidentiary record inconclusive and then must refer the case for a Forensic Competency Evaluation by a Mental Health Professional.

Upon receipt of the Forensic Competency Evaluation, the Immigration Judge shall conduct a Competency Review and determine whether a preponderance of the evidence establishes that the respondent is competent or incompetent to represent [himself/herself].

Recitation of the Evidentiary Record

The evidentiary record of this proceeding consists of:

- *List all documentary evidence such as:*
 - Documents filed by DHS with the Notice of Class Membership as a result of its screening, information gathering, and sharing obligations*
 - Other documents filed by either party*
 - Documents filed by third parties*
 - Documents obtained via the DHS Hotline*
 - Any report of Forensic Competency Evaluation*
 - Any documents requested by the Court*
- *List testimonial evidence*
- *List any other evidence*
 - Presentation of respondent during the proceeding*
- *List any relevant information from any other sources*

Findings of the Court

Respondent is a Class Member

The respondent in this case is a Member of the Class in *Franco-Gonzales v. Holder*. On [Date], the Department of Homeland Security filed a Notice of Class Membership. The Notice of Class Membership has been admitted into evidence as documentary Exhibit Number [Insert Exhibit Number].

The basis for inclusion of the respondent in the class is...

[Option 1] - DHS Screening and Identification

The Department of Homeland Security has determined that the respondent meets the criteria for Class Membership. Specifically, a qualified mental health provider has *[determined that the respondent.../diagnosed the respondent as demonstrating significant symptoms of...]* *[Insert here any basis for Class Membership listed in the Notice.]*

[Option 2] - Immigration Judge finding of *bona fide* doubt

On *[Date]*, the Court made a finding that it had a *bona fide* doubt about the competence of the respondent to represent *[himself/herself]* for the following reasons:

[Cite the portions of the evidentiary record that caused the Court to question whether the respondent was competent to perform the functions listed in the definition of competence to represent oneself.]

Judicial Competency Inquiry

Pursuant to the order of the District Court in *Franco-Gonzales v. Holder* on *[Date]*, I conducted a Judicial Competency Inquiry in this case following the procedures prescribed in the Order.

Specifically, I provided the necessary advisals and questioned the respondent in the manner directed in the Order.

[Insert a description of the questions and responses elicited in the Judicial Competency Inquiry.]

[Option 1] - Finding of Competence:

Based upon the totality of the evidence at the conclusion of the Judicial Competency Inquiry including, but not limited to the evidence developed at the Judicial Competency Inquiry, I find that there is no reasonable cause to believe the respondent is suffering from a mental disorder that impairs his or her ability to perform any of the functions listed in the definition of competence to represent oneself. Accordingly, I find the respondent competent to represent *[himself/herself]*.

[Option 2] - Finding of Incompetence:

Based upon the totality of the evidence at the conclusion of the Judicial Competency Inquiry (including, but not limited to the evidence developed at the Judicial Competency Inquiry), I find that a preponderance of the evidence establishes that the respondent is incompetent to *[List the function(s) in the definition of competence that the respondent is unable to perform]*. Accordingly, I find that a preponderance of the evidence establishes that the respondent is incompetent to represent *[himself/herself]*.

[Option 3] - Insufficient Evidence to Determine Competence:

Referral for a Forensic Competency Evaluation

At the conclusion of the Judicial Competency Inquiry, the evidentiary record was insufficient to support a finding of incompetence, but the court had a reasonable cause to believe that the individual was suffering from a mental disorder that may impair his or her ability to represent him- or herself. Accordingly, I referred the respondent for a Forensic Competence Evaluation by a Mental Health Professional and scheduled a Competency Review.

Competency Review

On [Date], a report of Forensic Competency Evaluation was filed in this matter by [Insert Name of Doctor]. The report has been admitted into evidence as documentary Exhibit Number [Insert Exhibit Number].

[Option 1] - Finding of Competence:

Based upon the totality of the evidence, including but not limited to the report of the Forensic Competency Evaluation and the evidence developed at the Judicial Competency Inquiry, I find that a preponderance of the evidence establishes that the respondent is competent to perform the functions listed in the definition of competence to represent oneself.

[Option 2] – Finding of Incompetence

Based upon the totality of the evidence, including but not limited to the report of Forensic Competency Evaluation and the evidence developed at the Judicial Competency Inquiry, I find that a preponderance of the evidence establishes that the respondent is incompetent to [Insert the function(s) from the definition of competence that the respondent is unable to perform]. I therefore find the respondent is incompetent to represent [himself/herself].

Provision of a Qualified Representative

(if respondent found incompetent)

As the respondent has been found incompetent to represent [himself/herself] in this proceeding, I ordered that a Qualified Representative be provided. An “Order for Provision of a Qualified Representative” issued on [Date].

[If a Qualified Representative is determined to be an adequate safeguard and protection, the following paragraph may be added and the Court may proceed to address the substantive immigration issues in the case.]

On [Date], Qualified Representative [Name] filed a Form E-28 entering [his/her] appearance in this matter and the Court proceeded to address the substantive immigration law issues in the respondent’s case.

Other Appropriate Safeguards and Protections

In addition to provision of a Qualified Representative, the Court provided the following additional safeguards and protections:

[List additional safeguards and protections provided.]

[If no adequate safeguards or protections are available to ensure the fundamental fairness of the hearing, the Court should list all safeguards and protections considered, state the reason each considered safeguard or protection is inadequate, and identify the method employed to stop the proceeding.]

[If sufficient safeguards and protections are in place, the Court should proceed to address the substantive legal issues in the case (e.g., removability, eligibility for relief, etc.) and findings of fact and conclusions of law regarding the immigration issues in the case may be inserted here.]

Order(s)

IT IS ORDERED that... *[Insert any appropriate orders here].*

[Name of Judge]
Immigration Judge

Certificate of Service

This document was served by: Mail (M) Personal Service (P)
To: Respondent Respondent c/o Custodial Officer Respondent's Atty/Rep DHS

Date: _____ By: Court Staff _____